(2)

No. 95-891

In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Writ Of Certiorari
To The Ohio Supreme Court

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT, SUGGESTING DISMISSAL OF WRIT AS IMPROVIDENTLY GRANTED

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QUESTION PRESENTED

In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court held that when a state court cites both state and federal grounds for its decision, this Court would presume the state grounds are not "adequate and independent" enough to preclude review unless the state case contained a "plain statement" that the federal cases "do not themselves compel the result." In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court declined to apply such a conclusive presumption in favor of review to habeas corpus cases. Instead, the Court relaxed the presumption of reviewability to respect the pre-eminent role of state courts in correcting their own errors, to reflect more accurately the state court's intent, to avoid unnecessary costs of review, and to maintain symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the lower courts' 28 U.S.C. § 2254 jurisdiction.

Should the presumption of reviewability by this Court of direct appeal cases also be relaxed, to further achieve the values animating *Coleman v. Thompson*, and does that warrant dismissal of the writ in this case?

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INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 9000 attorneys and 30,000 affiliate members, including representatives from every state of the Union. The American Bar Association awards NACDL full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. As part of its mission, NACDL strives to defend individual rights and liberties, whether they are guaranteed by the United States or by one of the fifty states.

This case raises the question whether this Court should adhere to a conclusive presumption of reviewability of certain state court decisions in criminal cases on direct appeal, when that presumption may conflict with the language and context of the state court opinion, may impose substantial costs of additional review on the states, and is unnecessary to further the goal of symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the federal courts' 28 U.S.C. § 2254 jurisdiction. This is an issue that can – as in this case – have substantial impact upon the state courts' protection of

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[1] The parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court. A copy of their letters giving written consent are being filed with the Court.

individual rights and liberties against government interference and, hence, it is an issue that falls within NACDL's core concerns.

SUMMARY OF ARGUMENT

This year, the Court has once again recognized the right of the states to be free from federal Congressional intrusion, absent a clear Constitutional mandate justifying the federal action. *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996) (overruling holding of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Congress has power under Interstate Commerce Clause to abrogate states' Eleventh Amendment immunity and subject states to federal court jurisdiction). *Accord United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995) (Congress exceeded its authority under the Commerce Clause when it enacted the Gun-Free School Zones Act, because gun possession in or near schools is unrelated to commerce or commercial activity).

This year, Congress acknowledged the pre-eminent role of the state courts in adjudicating constitutional issues in state criminal cases, by passing habeas corpus legislation limiting the jurisdiction of the lower federal courts to review such decisions. *E.g.*, 28 U.S.C. § 2254(b) (codifying exhaustion requirements); 28 U.S.C. § 2254(d) (requiring deference to state court adjudication of federal constitutional issues); 28 U.S.C. § 2254(e) (requiring deference to state court adjudication of factual issues); 28 U.S.C § 2244(d)(1) (new statute of limitations); 28 U.S.C.

§ 2253(c) (limiting appellate review absent certificate of appealability issued by circuit judge).

This Court in *Coleman v. Thompson*, 501 U.S. 722 (1991), similarly acknowledged the critical role of the state courts in correcting their own errors, including constitutional errors, in state criminal cases. *Coleman* accomplished this by rejecting an absolute presumption of federal reviewability on habeas corpus in cases where federal grounds are discussed in a state court decision. *Id.* at 735-36.

NACDL respectfully suggests that *Michigan v. Long*, 463 U.S. 1032 (1983), with its conclusive presumption of reviewability on direct review of certain state court decisions, is now out of step. A conclusive presumption of reviewability fails to respect the state court's intent where the state court's language and a well-established state rule of interpretation (here, Ohio's "syllabus rule") show that the state court meant to base its decision on state grounds (even without a "plain statement" in the words prescribed by *Michigan v. Long*). A conclusive presumption of reviewability also fails to achieve the goal of saving unnecessary costs of review in this context: it can trigger further state review under state law. Further, a conclusive presumption fails to achieve the goal of symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the federal courts' 28 U.S.C. § 2254 jurisdiction – granting parties no greater access to federal review via § 2254 than § 1257 – where no federal review at all is available under § 2254. That is precisely the case here, as we explain below.

Making *Michigan v. Long*'s presumption of reviewability a rebuttable one would enable this Court to weigh a factor, such as a state rule of interpretation which suggests the state court's decision was based on independent state grounds, in a particular case. This is especially important under 28 U.S.C. § 1257, where the adequate and independent state ground rule precluding review of a state high court decision is jurisdictional, and an erroneous grant of jurisdiction would implicate this Court's power to act. The fact that the ordinary presumption of this Court is against jurisdiction, that the general rule is one of constitutional avoidance, and that the presumption of reviewability is supposed to accord deference to state *court* determinations (not state prosecutorial determinations), also support a relaxation of the presumption of reviewability here.

Amicus therefore respectfully suggests that the presumption of reviewability should be *rebuttable* where, as here, this Court considers reviewing a state court decision that cites state and federal law, but lacks a *Michigan v. Long* "plain statement" that the state law holding is adequate and independent of federal law. The presumption is rebutted in this case because the state court's language, when construed in light of a clear and well-established state court rule of interpretation, Ohio's "syllabus" rule, shows that the Ohio Supreme Court intended to base its decision on independent state grounds. The writ should therefore be dismissed. Alternatively, given the points we raise, amicus suggests vacating the state court's judgment and remanding for clarification.

ARGUMENT

I. THE DEVELOPMENT OF THE ADEQUATE AND INDEPENDENT STATE GROUND DOCTRINE DEMONSTRATES THAT THE PRESUMPTION OF REVIEWABILITY IN HABEAS CORPUS CASES IS NEITHER IRREBUTTABLE NOR UNIVERSALLY APPLICABLE

A state court judgment based on independent and adequate state grounds is insulated from federal review. *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551 (1940); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

In *Michigan v. Long*, 463 U.S. 1032, however, this Court created a presumption in favor of Supreme Court review following direct appeal when a state court cites both federal and state law in support of its holding. The state court must take the affirmative step of stating that it has cited federal decisions only for "the purpose of guidance" on state law to avoid this presumption:

> [W]hen, as in this case a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, *we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.* If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion *that the federal cases are being used only for the purpose of guidance, and do not*

> *themselves compel the result that the court has reached.*

Id. at 1041 (emphasis added). This presumption assumes that there are no independent and adequate state grounds when the state court does not clarify that its state holding is independent of the cited federal cases. *Id.* at 1042.

Notably, however, this Court in *Michigan v. Long*, 463 U.S. 1032, also recognized that there may be times when such a conclusive presumption is unwarranted: "There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the *appropriate action.*" *Id.* at 1041, n.6 (emphasis added).

Thereafter, in *Harris v. Reed*, 489 U.S. 255 (1989), this Court applied *Michigan v. Long*'s "plain statement" rule to cases pending on federal habeas corpus review. In *Coleman v. Thompson*, 501 U.S. 722, 734-35, this Court reiterated the presumption's applicability to the question of independent and adequate state grounds for procedural default on habeas corpus review: "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." *Id.*

Coleman v. Thompson, however, also made clear that a conclusive presumption of federal court reviewability is not always applicable in habeas cases. As this Court explained in *Coleman*: "[W]e will not impose on state courts the responsibility for using particular language in

every case in which a state prisoner presents a federal claim – *every state appeal*, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case." *Id.* at 739 (emphasis added). The presumption of reviewability did not apply in *Coleman*, notwithstanding the absence of a "plain statement" in the state court's opinion that its state law holding was independent and adequate, since the Virginia Supreme Court's dismissal of review "fairly appear[ed]" to rest primarily on state law. *Coleman*, 501 U.S. at 740-41.

Similarly, this Court has held that a conclusive presumption of reviewability does not apply to unexplained summary dispositions by state courts in habeas corpus cases. *Ylst v. Nunnemaker*, 501 U.S. 797, 804-05 (1991) (adopting rebuttable, "look-through" presumption for determining whether independent and adequate state grounds barred federal habeas review where final state court's order is unexplained).

Thus, while this Court has retained *Michigan v. Long*'s presumption in favor of this Court's jurisdiction over dissent, *see, e.g., Arizona v. Evans*, 514 U.S. ___, 115 S.Ct. 1185, 1197 (1995) (Ginsburg, J., with whom Stevens, J., joins, dissenting), this Court has also made clear that in habeas corpus cases, the presumption is neither universally applicable nor conclusively irrebuttable. This case presents the question whether the presumption of reviewability ought to have equivalent exceptions in direct appeal cases.

II. THE VALUES ANIMATING THE *MICHIGAN V. LONG* PRESUMPTION OF REVIEWABILITY ON DIRECT APPEAL ARE ILL-SERVED IN MANY CASES BY A CONCLUSIVE PRESUMPTION

A. The Goals of the Presumption of Reviewability

The *Michigan v. Long* presumption seeks to achieve several goals. It aims to reflect accurately the state court's intent in most cases. *Coleman v. Thompson*, 501 U.S. 722, 737; *Michigan v. Long*, 463 U.S. 1032, 1041 ("when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so"). *See Harris v. Reed*, 489 U.S. 255, 276 (Kennedy, J., dissenting) (citing *Michigan v. Long* and questioning whether the "most reasonable explanation" for a state court's decision to cite a procedural bar is really that the court intended to ignore the bar).

The presumption is supposed to avoid unnecessary costs of review. *Coleman v. Thompson*, 501 U.S. 722, 737 (a conclusive presumption, like that of *Michigan v. Long*, 463 U.S. 1032, should avoid the costs of excessive inquiry where a per se rule will achieve correct results in almost all cases). *Accord Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977).

The presumption is also supposed to preserve symmetry between the scope of this Court's § 1257 review and the scope of the federal courts' § 2254 review. *Coleman v. Thompson*, 501 U.S. 722, 730-31.

B. The Goal of Accurately Reflecting the State Court's Intent is Ill-Served by a Conclusive Presumption of Reviewability Where a State Rule of Interpretation Shows that the State Court Meant to Base its Decision on State Law

The goal of accurately reflecting the state court's intent is ill-served by a conclusive presumption of reviewability where a state rule of interpretation shows that the state court intended to rely on state law (even absent a *Michigan v. Long* "plain statement" to that effect). That is precisely the case here. Ohio's clear and long-standing "syllabus rule" provides that the holding lodged in the syllabus of the Ohio Supreme Court's decision constitutes the holding of the case – and the only holding of the case. *Williamson Heater Co. v. Radich*, 128 Ohio St. 124, 126, 190 N.E. 403, 404 (1934). *See Ohio v. Gallagher*, 425 U.S. 257, 259 (1976) ("We also note that, except for per curiam opinions, it is the settled rule in Ohio that its Supreme Court speaks as a court only through the syllabi of its cases.") (citations omitted). In *State v. Robinette*, syllabus number 2 states, in full:

> The right, guaranteed by the federal *and Ohio Constitutions*, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

Id., 73 Ohio St.3d 650, 650-51, 653 N.E.2d 695, 696 (1995) (emphasis supplied). Since the syllabus states that the

court rests its decision on the Ohio Constitution as well as the U.S. Constitution, and since the Ohio syllabus rule provides that the syllabus contains the holding of the case, the conclusion is inescapable that the Ohio Supreme Court meant to hold that it relied in equal measure on its own constitution and the U.S. Constitution for its holding.[2]

Ohio is not unique in having a state rule of interpretation explaining how to determine the content of the state court's holding. Other states also have rules of interpretation designed to clarify the holdings of their decisions. Some are a clear response to the *Michigan v. Long* "plain statement" rule. The New Hampshire Supreme Court, for example, has stated: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our

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[2] The fact that the state court based its decision concerning the scope and duration of a traffic stop on state law is unexceptional. Other state courts have based similar conclusions on state law. *See, e.g., State v. Claxton*, ___ P.2d ___, 1996 WL 185759 (Or. App. Apr. 17, 1996) at *2 (state law allowing police to "investigate and verify" identity of person who fails to produce license may provide independent basis for seeking consent to search, which is normally precluded in a routine traffic stop that is limited in scope and duration to the traffic problem that caused the stop, if officer was subjectively motivated by purpose of determining identity); *State v. Dominguez-Martinez*, 321 Or. 206, 212, 895 P.2d 306, 309 (Or. 1995) (when police stop a vehicle for a traffic violation, they may investigate only that violation unless some independent basis for broadening the scope of the stop is shown; based on state statute).

results bound by those decisions." *State v. Ball*, 124 N.H. 226, 233, 471 A.2d 347, 352 (1983). Similarly, the Oregon Supreme Court has said: "Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines." *State v. Kennedy*, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983). And the Washington Supreme Court has explained that when it interprets a state constitutional provision first, prior to addressing an analogous federal claim, it does so "to develop a body of *independent* jurisprudence because considering the United States Constitution first would be premature." *State v. Johnson*, 128 Wash.2d 431, 909 P.2d 293, 301 (1996) (emphasis added) (citation omitted).[3]

The goal of accurately reflecting the state court's intent is not furthered by a conclusive presumption of

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[3] *See also People v. Pettingill*, 145 Cal. Rptr. 861, 21 Cal.3d 231, 578 P.2d 108, 118 (1976) ("The construction of a provision of the California Constitution remains a matter of California law regardless of the narrower manner in which decisions of the United States Supreme Court may interpret provisions of the federal constitution. . . . Indeed our Constitution expressly declares that 'rights guaranteed by the Constitution are *not dependent* on those guaranteed by the United States Constitution.' ") (citing Cal. Const. art. 1, § 24) (emphasis added); *State v. Opperman*, 247 N.W.2d 673, 674 (1976) ("This court is the final authority on interpretation and enforcement of the South Dakota Constitution. We have always assumed the *independent* nature of our state constitution regardless of any similarity between the language of that document and the federal constitution.") (emphasis added).

reviewability where, as here, a state rule of interpretation shows that the state court meant to base its decision on adequate and independent state grounds, even absent a *Michigan v. Long* "plain statement" in each case to that effect.[4] A rebuttable presumption, which would allow this Court to consider a state rule of interpretation such as Ohio's syllabus rule, promises more reliable results when deciding the nature of the state court's holding. Giving consideration to such a state court rule of interpretation also comports with the notion that the context in which language is used is critical to determining the language's meaning. *See Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 506 (1995) ("the meaning of statutory language, plain or not, depends on context") (citations omitted).

C. The Goal of Saving the Costs of Unnecessary Review is Ill-Served by a Conclusive Presumption of Reviewability Where a State Rule of Interpretation Shows that the State Court Meant to Base its Decision on State Law

This Court has made clear that the *Michigan v. Long* presumption, like any presumption, is designed to

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[4] Even the brief amicus curiae file by Americans for Effective Law Enforcement Inc., candidly acknowledges that the state court's language certainly makes it sound like it was basing its decision on state law. *Brief Amicus Curiae of Americans for Effective Law Enforcement Inc.*, p. 4 ("The court below. . . . ruled that the right guaranteed by the federal and state (Ohio) constitutions, to be secure in one's person and property, requires that citizens stopped for traffic offenses be clearly informed by the detaining officer as to when they are free to go after a valid detention . . . "); *id.* pp. 7-8 (the Ohio Supreme Court "has elevated a police practice to the position of a federal *and state* constitutional right") (emphasis added).

minimize the costs of unnecessary, individualized review. *Coleman v. Thompson*, 501 U.S. 722, 737. While any per se rule concerning whether to accept review will reduce the costs to this Court of determining reviewability, a conclusive presumption in favor of reviewability promises to raise costs to the states, where a state court meant to base its decision on state law.

Michigan v. Sitz, 496 U.S. 444 (1990), provides an example of this problem. In *Sitz*, this Court held that an initial stop of a motorist at a roadside sobriety checkpoint by Michigan police did not violate the Fourth Amendment. This Court reversed a lower Michigan appellate court decision, 170 Mich. App. 433, 429 N.W.2d 180 (1988), which had affirmed the Wayne County Circuit Court's order permanently enjoining the checkpoint program on the grounds that it violated the Fourth Amendment *and* the Michigan Constitution. On remand from *Michigan v. Sitz*, 496 U.S. 444, which reversed the state court's decision on federal grounds, the Michigan Court of Appeals reached the same conclusion that it had reached before: sobriety checkpoints violate the state constitution. *Sitz v. Dept. of State Police*, 193 Mich. App. 690, 485 N.W.2d 135 (1992), *aff'd*, 443 Mich. 744, 506 N.W.2d 209 (1993). *See generally Arizona v. Evans*, 514 U.S. ___, 115 S.Ct. 1185, 1197 (Ginsburg, J., dissenting, with whom Stevens, J., joins) (comparing 14.3% rate of reinstatement of decisions on state grounds by state courts on remand from this Court pre-*Long*, with 26.7% rate of reinstatement post-*Long*) (citation omitted). This shows that the *Long* presumption may reduce the costs of determining reviewability by this Court, but does so by increasing the costs of judicial inquiry by the state courts.

Similarly, in *South Dakota v. Neville*, 459 U.S. 553 (1983), a pre-*Long* decision, this Court held that admission into evidence of a driver's refusal to take a blood-alcohol content test did not violate the Fifth Amendment right against self-incrimination. This Court accepted review despite the fact that the state court below had framed the question as "whether SDCL 32-23-10.1 is a violation of Neville's federal and state constitutional privilege against self incrimination," and had held "that evidence of the accused's refusal to take a blood test violates the federal and state privilege against self-incrimination . . . " *State v. Neville*, 312 N.W.2d 723, 725-26 (1981) (citing U.S. Const. amend. V and S.D. Const. art. VI, § 9). This Court had also accepted review despite a clear and well-established state rule of interpretation that South Dakota "assume[s] the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution." *State v. Opperman*, 247 N.W.2d 673, 674. On remand, the South Dakota Supreme Court held – solely on state grounds – that admission of the defendant's refusal to submit to a blood-alcohol content test was inadmissible. *State v. Neville*, 346 N.W.2d 425 (1984) ("Since Neville was not fully informed of this consequence [that his refusal to submit to the test would be admissible], he did not voluntarily, knowingly and intelligently waive his constitutional protection of due process and prohibition against self-incrimination."). This shows that this Court's failure to consider clear, well-established state rules of interpretation when deciding whether a state decision is based on independent grounds can also increase the costs of judicial inquiry by the states.

A conclusive presumption of reviewability where the state court has indicated that its decision was based on state law – *albeit* not in *Michigan v. Long*'s prescribed words – therefore fails to avoid the costs of excessive inquiry. *See Coleman v. Thompson*, 501 U.S. 722, 737. Both the *Long* presumption and the failure to consider state rules of interpretation have increased such successive inquiry, and the cost falls on the state courts.

This may simply be the cost of the problem that state courts misunderstand the "plain statement" rule, leaving the basis of their decisions unclear to this Court. The confusion in the state courts, however, should not be ignored. That problem actually militates in favor of revisiting the *Michigan v. Long* rule. *See Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (reversing prior 11th Amendment precedent: "Since it was issued, [*Pennsylvania v.*] *Union Gas* [*Co.*, 491 U.S. 11 (1989)] has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision.").

Amicus suggests that tempering the *Michigan v. Long* presumption of reviewability with *Coleman v. Thompson*'s recognition that the presumption is neither universally applicable nor necessarily conclusive could go a long way to easing the costs placed on state courts by the current strict presumption of reviewability on direct appeal. *Cf. Coleman v. Thompson*, 501 U.S. 722, 739 ("A broad presumption would also put too great a burden on the state courts.").

D. The Goal of Symmetry Between this Court's § 1257 Jurisdiction and the Lower Courts' § 2254 Jurisdiction is Ill-Served by a Conclusive Presumption of Reviewability Where Habeas Review of the Issue is Unavailable

Michigan v. Long's presumption of reviewability is also supposed to provide symmetry between this Court's 28 U.S.C. § 1257 jurisdiction and the federal courts' 28 U.S.C. § 2254 jurisdiction – granting parties no greater access to federal review via one route, particularly § 2254, than the other. As this Court explained in *Coleman v. Thompson*, 501 U.S. 722, 730-31, "Without the [adequate and independent ground] rule [in habeas], a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this court's jurisdiction and a means to undermine the state's interest in enforcing its laws."[5] A presumption in favor of jurisdiction under § 1257 undermines this goal where federal habeas review of the issue is completely unavailable.

That is precisely the case here. The issue on which review was granted arises under the Ohio Constitution's search and seizure provision and the Fourth Amendment,

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[5] *See also id.* at 732 ("In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.").

and is of practical importance to the criminal case only because of the exclusionary rule remedy. In *Stone v. Powell*, 428 U.S. 465, 482, 484 (1976), however, this Court held that the *Mapp v. Ohio*, 367 U.S. 643 (1961), exclusionary rule remedy is generally unenforceable on habeas corpus.[6] Since the exclusionary rule remedy is generally unenforceable under 28 U.S.C. § 2254, the goal of symmetry is undermined – not served – by a conclusive presumption of reviewability of exclusionary rule claims on direct review under § 1257.

III. A CONCLUSIVE PRESUMPTION OF REVIEWABILITY IS LEAST JUSTIFIED WHERE, AS HERE, REVIEW IMPROPERLY GRANTED PRESENTS A JURISDICTIONAL DEFECT, NOT JUST A PRUDENTIAL ISSUE

The bar on this Court's review of a state high court's decision on direct appeal, where that decision rests on adequate and independent state grounds, is jurisdictional. As this Court has explained: "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729. *See also id.* at 730 ("When this Court reviews a state court

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[6] The exception, of course, is where "the State has [not] provided an opportunity for full and fair litigation" of that claim. *Stone v. Powell*, 428 U.S. 465, 494-95.

decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Application of the adequate and independent ground doctrine to bar review of a state court decision on habeas corpus, however, is not a jurisdictional matter. It is a prudential limit designed to foster comity and federalism. *Coleman v. Thompson*, 501 U.S. 722, 730 (distinguishing basis for adequate and independent state ground rule on federal court's habeas review from basis for the rule on this Court's § 1257 review on direct appeal: "In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism"); *id.* at 731-32 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him. . . . In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases."); *id.* at 765 (Blackmun, J., dissenting, joined by Marshall, J., and Stevens, J.) ("It is well settled that the existence of a state procedural default

does not divest a federal court of jurisdiction on collateral review. . . . Rather, the important office of the federal courts in vindicating federal right gives way to the States' enforcement of their procedural rules to protect the States' interest in being an equal partner in safeguarding federal rights.") (citation omitted).[7]

A presumption necessarily entails some measure of error. *Coleman v. Thompson*, 501 U.S. 722, 737 ("The presumption [of *Michigan v. Long*], like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a per se rule will achieve the correct result in *almost all* cases") (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16, for rule: "Per se rules . . . require the Court to make broad generalizations . . . Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."). *See also Coleman v. Thompson*, 501 U.S. 722, 737 ("We accept errors in those small number of cases where there was nonetheless an independent and adequate state ground in exchange for a significant reduction in the costs of inquiry.").

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[7] The non-jurisdictional nature of the independent and adequate state procedural default rule in habeas cases is bolstered by recent amendments to 28 U.S.C. § 2254 bearing on the related procedural issue of exhaustion. Subsection (b)(2) now expressly states: "An applicant for a writ of habeas corpus *may be denied on the merits*, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." (Emphasis added).

Jurisdiction implicates the very power of this Court to act. *Carlisle v. United States*, ___ U.S. ___, 1996 WL 202555 (Apr. 29, 1996) (Ginsburg, J., concurring, with whom Souter, J., and Breyer, J., join) (defining subject matter jurisdiction as power of court to act). Comity and federalism concerns do not.

A conclusive presumption that errs in favor of reviewability is therefore especially unwarranted where, as here, jurisdiction arises under § 1257, because it could unduly expand this Court's jurisdiction, *i.e.*, the power of this Court to act. *Carlisle v. United States*, ___ U.S. ___, 1996 WL 202555, * 5 (district court lacks power to act on motion for judgment of acquittal filed one day outside time limits: "Assuming *arguendo* that these contentions [predicting numerous needless appeals of habeas proceedings as a result of decision] are accurate we cannot permit them to alter our analysis, for we are not at liberty to ignore the mandate of Rule 29 in order to obtain 'optimal' policy results."). *See Berman v. United States*, 378 U.S. 530 (1964) (summary affirmance of dismissal of appeal filed one day late).

IV. THE PRESUMPTIONS AGAINST FEDERAL COURT AND SUPREME COURT JURISDICTION, OF CONSTITUTIONAL AVOIDANCE, AND THE GOAL OF COMITY ALSO COUNSEL AGAINST A CONCLUSIVE PRESUMPTION OF REVIEWABILITY HERE

The ordinary presumption in federal court is against jurisdiction. *See Delaware v. Van Arsdall*, 475 U.S. 673, 692 (1986) (Stevens, J. dissenting); *King Iron Bridge & Mfg. Co. v. County of Otoe*, 120 U.S. 225, 226 (1887). This obviously

counsels against a conclusive presumption of reviewability by this Court.

In addition, the petitioner has the burden of showing that this Court can, and should, exercise jurisdiction. Sup. Ct. R. 10. *Cf. Michigan v. Long*, 463 U.S. 1032, 1054 (Blackmun, J., concurring) (noting "increased danger of advisory opinions in the Court's new approach"). This also counsels against a conclusive presumption of reviewability by this Court.

Further, the general rule in this Court is one of constitutional avoidance. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). *See generally Peretz v. United States*, 501 U.S. 923, 929-30 (1991) ("[t]he principle of *constitutional avoidance* led us to demand clear evidence that Congress actually intended to permit magistrates to take on a role that raised a *substantial constitutional question.*") (emphasis added) (citation omitted)[8]; *Lyng Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46

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[8] In fact, this Court in *Peretz v. United States*, 501 U.S. 923, made clear that where, as here, the government seeks to deprive an individual of an important privilege or right, the principle of constitutional avoidance is especially appropriate: "The requirement that Congress express its intent clearly was also appropriate because the Government was asking us in *Gomez* to construe a general grant of authority to authorize a procedure that deprived an individual of an important privilege, *if not a right.*" *Peretz*, 501 U.S. 923, 930. This is perhaps the converse of Justice Stevens' suggestion to construe broadly this Court's jurisdiction when a constitutional right is implicated. *Cf. Michigan v. Long*, 463 U.S. 1032, 1068 (Stevens, J., dissenting) ("I believe that in reviewing the decisions of state courts, the primary role of this court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.").

(1988); *West v. Aikins*, 487 U.S. 42, 49 n.8 (1988); *Jean v. Nelson*, 472 U.S. 846 (1985); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) ("[t]his Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' "). This principle militates against a conclusive presumption of reviewability in cases like this, where a federal constitutional question is presented and might unnecessarily be decided.

Federalism is the core concern underlying the adequate and independent state ground line of decisions. *Coleman v. Thompson*, 501 U.S. 722, 725 ("This is a case about federalism."). But which way does federalism cut? This Court has generally described the value of federalism in the adequate and independent state ground context as respect for state courts – not deference to state prosecutors. *Michigan v. Long*, 463 U.S. 1032, 1040 ("Respect for the *independence of state courts*, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this *respect for state courts*, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review . . . ") (emphasis added); *id.*, 463 U.S. 1032, 1041 ("This approach obviates in most instances the need to examine state law in order to decide the nature of the state court decision. . . . We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded

by federal interference. . . . "); *id.* at 1041 (" 'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.' ") (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).

A conclusive presumption of reviewability in this case – in the face of the Ohio Supreme Court's statement in the syllabus of its decision which comprises its holding that it was relying on both the state and U.S. Constitutions – may grant deference to the Montgomery County, Ohio, Prosecuting Attorney. But it undermines deference to the Ohio Supreme Court. The presumption of reviewability should not stand as a conclusive wedge between the state's highest court, which stated in its holding that it was relying upon state law, and a county prosecutor who lost in state court. Federalism, thus, also counsels against a conclusive presumption of reviewability.

V. THIS COURT SHOULD HOLD THAT *MICHIGAN V. LONG*'S PRESUMPTION OF REVIEWABILITY OF DIRECT APPEAL CASES, LIKE *COLEMAN V. THOMPSON*'S PRESUMPTION OF REVIEWABILITY ON HABEAS, IS NEITHER IRREBUTTABLE NOR UNIVERSALLY APPLICABLE – IT IS REBUTTED OR INAPPLICABLE WHERE, AS HERE, A WELL-ESTABLISHED STATE RULE OF INTERPRETATION SHOWS THAT THE STATE GROUND OF DECISION IS ADEQUATE AND INDEPENDENT

This Court has stated, "Our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases "correction through

legislative action is practically impossible." ' " *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 1127 (numerous citations omitted). Amicus respectfully urges this Court to reconsider *Michigan v. Long*'s presumption of reviewability of federal constitutional claims arising on direct review in state cases, given the presumption's failure to achieve its stated goals, and to decide whether other, "appropriate action," in the words of *Michigan v. Long*, 463 U.S. at 1041, n.6, is needed. Amicus respectfully suggests that this Court should then hold that, following *Coleman v. Thompson* and *Ylst v. Nunnemaker*, the presumption of reviewability has exceptions, and is subject to rebuttal, on review of state court decisions on direct appeal – just as the presumption has exceptions and is subject to rebuttal on habeas review. Amicus also suggests that this Court should conclude that the presumption is rebutted where, as here, a clear and well-settled state rule of interpretation shows that the state court meant to base its holding on independent state law. For the reasons explained above, amicus also respectfully suggests that this Court abandon the presumption of reviewability completely where *Stone v. Powell* bars review of the exclusionary rule issue on habeas.

VI. CONCLUSION

This Court should dismiss the writ as improvidently granted on the ground that the Ohio Supreme Court's decision, lodged in its syllabus and based on the Ohio Constitution, when interpreted in light of Ohio's syllabus rule, provides an adequate and independent state ground of decision. Alternatively, given the points we raise, amicus suggests vacating the state court's judgment and

remanding for clarification of its decision. *Arizona v. Evans*, 514 U.S. ___, 115 S.Ct. 1185, 1190 n.3; *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) (vacating state court judgment and remanding for further proceedings as state court might deem appropriate to clarify ground of its decision).

Respectfully submitted,

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